Supreme Court, U.S.
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No. 92-417

In the Supreme Court of the United States

OCTOBER TERM, 1992

FREDERICK AXMEAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether comprehensive voir dire concerning tax audits and investigations rendered harmless the district court's refusal to grant a continuance requested by petitioner so that he could obtain additional jury panel information pursuant to 26 U.S.C. 6103(h)(5).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Holden v. *United States*, No. 92-5443 (Nov. 2, 1992)	4
Masat v. *United States*, 113 S. Ct. 108 (1992)	4
Murphy v. *Florida*, 421 U.S. 794 (1975)	6
Schandl v. *United States*, 112 S. Ct. 2946 (1992)	4
United States v. *Droge*, 961 F.2d 1030 (2d Cir. 1991), petition for cert. pending, No. 92-5735	6, 7
United States v. *Hardy*, 941 F.2d 893 (9th Cir. 1991)	5, 7
United States v. *Hashimoto*, 878 F.2d 1126 (9th Cir. 1989)	6
United States v. *Hicks*, 947 F.2d 1356 (9th Cir. 1991)	5, 7
United States v. *Holden*, 963 F.2d 1114 (8th Cir. 1992), cert. denied, No. 92-5443 (Nov. 2, 1992)	5
United States v. *Huguenin*, 950 F.2d 23 (1st Cir. 1991)	5, 6, 7
United States v. *Lussier*, 929 F.2d 25 (1st Cir. 1991)	7
United States v. *Masat*:	
896 F.2d 88 (5th Cir. 1990)	5, 7
948 F.2d 923 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992)	5, 7
United States v. *Schandl*, 947 F.2d 462 (11th Cir. 1991), cert. denied, 112 S. Ct. 2946 (1992)	5, 7
United States v. *Sinigaglio*, 942 F.2d 581 (9th Cir. 1991)	6
United States v. *Spine*, 945 F.2d 143 (6th Cir. 1991)	5, 7

Statutes: Page

Internal Revenue Code (26 U.S.C.):
§ 6103(h)(5) 2, 3, 4, 5, 6, 7
§ 7201 2

Miscellaneous:

138 Cong. Rec. H11,640-H11,656 (daily ed. Oct. 5, 1992) .. 2
138 Cong. Rec. S17,685-S17,707 (daily ed. Oct. 8, 1992) 2
H.R. 11, 102d Cong., 2d Sess. (1992) (Revenue Act of 1992) 2
S. Doc. No. 266, 94th Cong., 2d Sess. (1976) 6
28 Weekly Comp. Pres. Doc. 2283 (Nov. 4, 1992) 2

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 11-15) is reported at 964 F.2d 792.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1992. The petition for a writ of certiorari was filed on August 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of two counts of willfully attempting to

evade income tax, in violation of 26 U.S.C. 7201. Pet. 4.

1. More than four months before trial, petitioner sought access to the district court's jury list so that he could request information about prospective jurors from the Secretary of the Treasury pursuant to 26 U.S.C. 6103(h)(5). Pet. App. 12. That statute provides that the Secretary shall respond to a request from a party to a tax case for information concerning whether any prospective juror in the case has ever been the subject of an IRS audit or investigation.[1] The Secretary is limited to making a simple affirmative or negative response as to each juror.[2]

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[1] Section 6103(h)(5) provides:

> In connection with any judicial proceeding [concerning a taxpayer's liability under the tax laws] to which the United States is a party, the Secretary [of the Treasury] shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

[2] The Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. § 4905 (1992), would have repealed 26 U.S.C. 6103(h)(5) for proceedings pending on or commenced after the date of enactment. H.R. 11 was approved by the Senate, 138 Cong. Rec. S17,685-S17,707 (daily ed. Oct. 8, 1992), and House of Representatives, 138 Cong. Rec. H11,640-H11,656 (daily ed. Oct. 5, 1992), and sent to the President. It was, however, the subject of a pocket veto. See 28 Weekly Comp. Pres. Doc. 2283 (Nov. 4, 1992).

The district court directed the government to submit the jury list to the Secretary of the Treasury so that the Secretary could provide the requested information. The government did so, and the Secretary provided information as to whether the prospective jurors had been audited or investigated during the previous six years. Pet. App. 12.

At the beginning of trial, petitioner requested a continuance to inquire whether any juror had been audited or investigated during the past 25 years. Pet. App. 17. The district court denied that request. Pet. App. 20. Instead, the court determined that the requirements of Section 6103(h)(5) would be satisfied if, during voir dire, the court asked each of the prospective jurors whether he or she had ever been audited or investigated by the Internal Revenue Service (IRS). Pet. App. 20-21. Petitioner agreed that the district court's proposed questions would elicit the same information sought under Section 6103(h)(5). Pet. App. 14.

During voir dire, the district court asked each potential juror whether he or she had ever been audited or investigated by the IRS. In response to the court's questioning, several jurors stated that they had been audited. After selecting 30 members of the panel, the district court again asked whether any member of the panel had ever been audited or investigated by the IRS. Gov't C.A. Br. 2-3. Petitioner did not object to the district court's voir dire, and he did not respond when given the opportunity to ask additional questions concerning the prospective jurors' audit histories. Pet. App. 14.

2. On appeal petitioner argued, *inter alia*, that the district court erred in denying his request for a continuance to obtain additional jury panel information under Section 6103(h)(5). Pet. App. 12. Relying on its own precedent, as well as cases from the Second, Fifth, and Sixth Circuits, the court of appeals concluded that the denial of a defendant's request for a continuance to obtain additional Section 6103(h)(5) information is not reversible error when the district court conducts an appropriate voir dire. Pet. App. 13-14. The court held that, in light of the district court's inquiry during voir dire and petitioner's lack of objection to that inquiry, petitioner was not prejudiced by the district court's denial of his request for a continuance. Pet. App. 14-15.

ARGUMENT

1. The court of appeals correctly ruled (Pet. App. 14-15) that petitioner could not demonstrate that he had suffered any prejudice as a result of any alleged deficiencies in the Secretary's response to his Section 6103(h)(5) request.[3] Petitioner bases his claim of prejudice primarily on the fact that the Section 6103(h)(5) information he received from the Secretary covered only a six-year period, while he had requested such information for a 25-year period. Pet. 9. The

[3] This Court has recently denied three petitions for a writ of certiorari similarly presenting the question whether a thorough voir dire of prospective jurors could render harmless an alleged deficiency in providing a defendant with Section 6103(h)(5) information from the IRS. See *Holden* v. *United States*, No. 92-5443 (Nov. 2, 1992); *Masat* v. *United States*, 113 S. Ct. 108 (1992); *Schandl* v. *United States*, 112 S. Ct. 2946 (1992).

voir dire questioning by the judge, however, elicited each prospective juror's lifetime audit history. Indeed, petitioner agreed that the district court's proposed questions would elicit the same information that he sought under Section 6103(h)(5). Pet. App. 14. Petitioner did not object to the district court's voir dire, and he did not respond when given the opportunity to ask additional questions concerning the prospective jurors' audit histories. Pet. App. 14.

Courts presume that jurors respond truthfully to questions on voir dire, even sensitive or potentially embarrassing questions. *United States* v. *Huguenin*, 950 F.2d 23, 30 (1st Cir. 1991); *United States* v. *Spine*, 945 F.2d 143, 148 (6th Cir. 1991); *United States* v. *Masat*, 896 F.2d 88, 95 (5th Cir. 1990). Thus, absent evidence to the contrary, the voir dire in this case is presumed to have remedied any possible deficiencies in the Secretary's 6103(h)(5) response. Petitioner's receipt of the Section 6103(h)(5) information through voir dire accordingly overcame any prejudice that petitioner could have suffered. Accord *United States* v. *Holden*, 963 F.2d 1114, 1116 (8th Cir. 1992), cert. denied, No. 92-5443 (Nov. 2, 1992); *United States* v. *Huguenin*, 950 F.2d at 30; *United States* v. *Masat*, 948 F.2d 923, 926-927 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992); *United States* v. *Hicks*, 947 F.2d 1356, 1360-1361 (9th Cir. 1991); *United States* v. *Schandl*, 947 F.2d 462, 469 (11th Cir. 1991), cert. denied, 112 S. Ct. 2946 (1992); *United States* v. *Spine*, 945 F.2d at 145-148; *United States* v. *Hardy*, 941 F.2d 893, 895-896 (9th Cir. 1991); *United States* v. *Masat*, 896 F.2d at 94-95.

2. The decision of the court of appeals in this case is not in conflict with decisions of other circuits. In *United States* v. *Hashimoto*, 878 F.2d 1126 (9th Cir. 1989), which petitioner cites (Pet. 7), the court held that a presumption of a significant risk of prejudice is created by the denial of juror audit and investigation information, but the court specifically stated that the presumption "might be overcome if the examination of jurors during voir dire is such that the inference of risk of prejudice is negated."[4] 878 F.2d at 1134. In *United States* v. *Sinigaglio*, 942 F.2d 581, 583 (9th Cir. 1991), the case on which petitioner primarily relies, the Ninth Circuit held that it would not adopt a per se rule requiring reversal for the denial of Section 6103(h)(5) information, but found that the voir dire in that case did not negate the significant risk of prejudice created by the incomplete disclosure of audit information.

[4] We believe that a presumption of prejudice with respect to a violation of Section 6103(h)(5) is inappropriate. This Court has consistently upheld the presumption of a prospective juror's impartiality. See, *e.g.*, *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). There is no reason to believe that a violation of Section 6103(h)(5) is sufficient to rebut that presumption, for the fact that a juror may have been subject to an IRS audit or investigation is not by itself enough to establish bias for or against any party. Moreover, as a Report to the Administrative Conference of the United States observed, if an IRS investigation is apt to result in any bias, it is more likely to be against the government than against the defendant. S. Doc. No. 266, 94th Cong., 2d Sess. 1114 n.534 (1976) ("[p]resumably, very few taxpayers come out of a tax investigation with a pro-government bias"). See also *United States* v. *Droge*, 961 F.2d 1030, 1036 (2d Cir. 1992), petition for cert. pending, No. 92-5735; *United States* v. *Huguenin*, 950 F.2d 23, 30 (1st Cir. 1991).

In *United States* v. *Hardy*, 941 F.2d 893, 895-896 (9th Cir. 1991), the Ninth Circuit reaffirmed its decision to apply harmless error analysis to the incomplete disclosure of Section 6103(h)(5) information. In that case, voir dire questions that were "entirely specific and paraphrased the statute" were found sufficient to rebut what the court found to be the presumption of a significant risk of prejudice created when the petitioner was initially provided incomplete information. Most recently, in *United States* v. *Hicks*, 947 F.2d 1356 (9th Cir. 1991), the Ninth Circuit again applied harmless error analysis and affirmed the defendant's conviction based on his failure to allege, and his inability to prove, any prejudice. Thus, the decision of the court of appeals in this case does not conflict with any decision of the Ninth Circuit.

The decision in this case is also fully in accord with decisions of the First, Second, Fifth, Sixth, and Eleventh Circuits. See *United States* v. *Droge*, 961 F.2d 1030 (2d Cir. 1992), petition for cert. pending, No. 92-5735; *United States* v. *Huguenin*, *supra*; *United States* v. *Schandl*, *supra*; *United States* v. *Masat*, *supra*; *United States* v. *Spine*, *supra*; *United States* v. *Lussier*, 929 F.2d 25, 29-30 (1st Cir. 1991). As the First Circuit commented in *Huguenin*, any deficiencies in Section 6103(h)(5) information can be remedied on voir dire because "courts ordinarily presume veniremen to tell the truth on voir dire," 950 F.2d at 30, and, in any event, "even if some jurors were not to tell the truth on voir dire, the 'risk of prejudice' to which their falsehoods would expose a tax defendant is ephemeral." *Ibid.* Thus, there is no inter-circuit conflict requiring resolution by this Court, and the

court of appeals' factbound harmless error determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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